

**Appeal of the NFL Parties of the Special Master's Ruling
Regarding the Interpretation of the "Generally Consistent" Standard**

The National Football League and NFL Properties LLC (the "NFL Parties") respectfully appeal the Special Master's October 18, 2018 decision (the "Special Master Generally Consistent Ruling") denying the NFL Parties' objections to certain Special Master appeal determinations that turned on an interpretation of the Settlement Agreement's requirement that Qualifying Diagnoses of Level 1.5 and 2 Neurocognitive Impairment made outside the Baseline Assessment Program (the "BAP") be based on evaluation and evidence "generally consistent" with the diagnostic criteria set forth in the Agreement for diagnoses rendered in the BAP.

Specifically, the NFL Parties submit that the Special Master wrongly denied the NFL Parties' appeals of seven claims based on an incorrect interpretation and application of the "generally consistent" standard. Under the Special Master's construction, a retired player who takes the *identical* neuropsychological testing battery outlined in the BAP, and whose scores incontestably would *not* permit a Qualifying Diagnosis in the BAP, may nonetheless receive a Qualifying Diagnosis pursuant to relaxed diagnostic criteria if the player *pays* to see a Qualified MAF Physician as opposed to seeing the exact same physician for *free* in the BAP. The idea that a retired player can *buy* relaxed diagnostic criteria for the exact same neuropsychological testing—indeed, from the exact same physician—is wholly inequitable and anathema to the design of the Settlement Program. The "generally consistent" standard cannot reasonably be construed to permit such a result. Accordingly, the NFL Parties respectfully request that the Court overturn the

Special Master’s decisions and deny the claims at issue.¹ In addition, and pursuant to this Court’s continuing jurisdiction to oversee the implementation of the Settlement Agreement, the NFL Parties respectfully request that the Court construe the “generally consistent” standard for Level 1.5 and 2 Neurocognitive Impairment diagnosed outside of the BAP to preclude a Qualifying Diagnosis where the BAP test battery is applied and the results fail to satisfy the BAP diagnostic criteria.

PRELIMINARY STATEMENT

The bedrock principle of the Settlement Agreement is to pay all claims that meet the diagnostic impairment criteria set forth in its heavily negotiated Injury Definitions, while denying those claims that do not meet these thresholds as of the date of diagnosis. Under the express design of the Settlement Program, not all levels of cognitive and functional impairment—such as mild cognitive impairment—entitle a retired player to monetary compensation. Instead, the Settlement provides a 65-year term for retired players to file (and re-file) claims should their cognitive condition further decline and satisfy the impairment criteria set forth in the Injury Definitions. The Settlement is not a “now or never” exercise with respect to diagnosis and compensation.²

The Injury Definitions for Level 1.5 and 2 Neurocognitive Impairment were negotiated at length by the Parties in consultation with leading medical experts. These Injury Definitions prescribe specific neuropsychological testing (the “BAP testing

¹ Specifically, the NFL Parties appeal with respect to the claims of SPIDs 100000070, 100004758, 100005741, 100007941, 100009422, 100013190 and 950000215.

² Indeed, not only can retired players who do not meet the impairment criteria for any Injury Definition re-file their claims should their condition further decline, but retired players who satisfy the impairment criteria for a particular Injury Definition (and who are paid Monetary Awards consistent with that diagnosis) can also re-file claims if their condition declines further and satisfies the impairment criteria of a more severe Injury Definition that would provide additional compensation as of that date.

battery”) and provide impairment criteria, including precise T-score cutoffs as well as distribution requirements across five cognitive domains. These criteria—and the precise T-score cutoffs and distribution requirements—were central issues in the Court’s approval of the Settlement Agreement. In response to objectors’ arguments that this line-drawing established an “unreasonably high bar” for a Qualifying Diagnosis, Co-Lead Class Counsel responded that these specific criteria provided a reliable, objective testing regime that was both reasonable and supported by relevant medical science.³ This Court agreed in approving the Settlement, holding that the criteria were fair, reasonable and adequate, and emphasizing that players with lesser impairment—who do not satisfy the particular cutoffs and distribution requirements for compensation—may experience further decline over time such that their condition later becomes compensable under the terms of the Settlement Agreement.⁴

The NFL Parties’ consent to an uncapped Monetary Award Fund was predicated on the fundamental principle that the Parties had bargained for a clear demarcation of the boundary between compensable and non-compensable levels of impairment, as set forth in the Settlement Agreement’s BAP impairment criteria, including by means of the

³ See Mem. of Law in Supp. of Class Pls.’ Mot. for an Order Granting Final Approval of the Settlement and Certification of Class and Subclasses 85–86, ECF. No. 6423-1 (arguing that the cutoffs were “based on well-established methods and reasonable criteria,” touting the reliability of the “objective” test results, citing to expert testimony that the criteria are “reasonable and scientifically well-founded” and stating “when the BAP test battery (and related thresholds) for neurocognitive impairments has been applied in testing with retired players, it performs as intended. . . . a patient who will satisfy Level 1.5 Injury Definitions by testing is most likely to be in the early stages of dementia” (internal quotation marks omitted)).

⁴ See *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 403–04, 412 (E.D. Pa. 2015), *amended* No. 2:12-MD-02323-AB, 2015 WL 12827803 (May 8, 2015), and *aff’d* 821 F.3d 410 (3d Cir. 2016), *as amended* (May 2, 2016) (ruling that objectors were “misguided” because “[b]oth the cognitive and functional cutoffs are drawn directly from well-established sources,” and concluding that “[n]umerous empirical studies show that these [BAP] tests are effective at identifying impairment, especially in persons who have sustained brain injury” and that “[it] would be very difficult for any significant neurological abnormalities to escape an examination of this breadth”).

cutoffs and distribution requirements identified with respect to neuropsychological testing. Not a single objector nor Co-Lead Class Counsel argued that the criteria for the BAP testing battery could be evaded—and more relaxed criteria substituted—if the retired player simply paid for a diagnosis by a Qualified MAF Physician rather than obtaining a free diagnosis in the BAP. Co-Lead Class Counsel, however, have now changed their tune in argument to the Special Masters.

The Special Master’s interpretation of the “generally consistent” standard upends the bargained-for and judicially-approved neuropsychological testing regime. Specifically, the Special Master’s interpretation permits Qualified MAF Physicians to render Qualifying Diagnoses of Level 1.5 and 2 Neurocognitive Impairment to claimants on the basis of neuropsychological tests *identical* to those in the BAP testing battery even where, as with each of the claims here, the testing results are *facially insufficient* to satisfy the BAP diagnostic criteria. The Injury Definition’s “generally consistent” standard cannot reasonably be construed to support such blatant inconsistency. Indeed, the purpose of requiring that Qualifying Diagnoses rendered outside the BAP be “based on evaluation and evidence generally consistent with the diagnostic criteria set forth in” the BAP is to ensure that Settlement Class Members—both inside and outside the BAP, and both before and after the Effective Date—are placed on equal footing when evaluating their medical conditions for possible compensation. Permitting claimants who pay for a diagnosis to receive compensation they plainly would be denied if the exact same testing was performed for free by the exact same doctor in the BAP threatens the integrity of the Settlement Program and gives players examined outside the BAP an unfair and arbitrary advantage over those who participate in the BAP.

Surprisingly, the Special Master Generally Consistent Ruling does not discuss, or even mention, the inequitable results identified above, even though the NFL Parties made the very same arguments both in the appeals at issue and in the objections to the Special Master's determinations concerning those appeals. In particular, the Special Master does not address the NFL Parties' argument that his construction of the "generally consistent" standard violates the language and intent of the Settlement Agreement, as well as basic principles of fairness by privileging retired players who pay for a diagnosis over those that participate in the free BAP. Instead, the Special Master ruled on purely formalistic, erroneous legal grounds that the NFL Parties are precluded from objecting to the Special Master's appeal determinations because, in his view, those determinations turned on factual findings and not on conclusions of law.

Contrary to the Special Master's contention, however, the NFL Parties are entitled to object to the Special Master's construction of the "generally consistent" standard, and this Court has the unquestionable authority to rule on the issue. For the reasons set forth below, the Special Master's interpretation is manifestly incorrect—testing results that are *patently inconsistent* with an Injury Definition under the BAP cannot be "generally consistent" with that Injury Definition for purposes of a diagnosis paid for outside of the BAP. Such a result distorts the essential bargain the Parties agreed to in the Settlement Agreement and would create perverse incentives for retired players, lawyers and Qualified MAF Physicians, while severely prejudicing those retired players that participate in the BAP. Accordingly, the NFL Parties request that the Court deny the seven claims at issue, and clarify that the "generally consistent" standard does not permit

Qualifying Diagnoses of Level 1.5 or 2 Neurocognitive Impairment based on testing scores that preclude a Qualifying Diagnosis under the BAP.

BACKGROUND

A. The Seven Claims on Appeal

Each of the seven claims at issue involves a diagnosis by a neurologist who is both a Qualified MAF Physician (“MAF Physician”) and a Qualified BAP Provider (“BAP Provider”). In each case, the retired player paid to see the physician in his MAF capacity, rather than seeing the same physician for free in the BAP. In each case, the retired player was administered the precise BAP neuropsychological testing battery. Based on that testing, there is no dispute that none of the retired players would be entitled to the Qualified Diagnosis he received from the MAF Physician had he been evaluated by that same physician in the BAP. However, in each case, the MAF Physician overlooked the claimant’s failure to meet the necessary T-score cutoffs in the required cognitive domains and gave a Qualifying Diagnosis of either Level 1.5 or 2 Neurocognitive Impairment that incontrovertibly could not have been obtained in the BAP. Because a MAF Physician provided the Qualifying Diagnosis, the Claims Administrator did not consult with an Appeals Advisory Panel Member or Consultant (“AAP” or “AAPC”) or otherwise assess either the medical accuracy of the diagnosis or its conformity with the Injury Definition requirements of the Settlement Agreement before issuing a claim determination based on the purported Qualifying Diagnosis.⁵

⁵ As explained in the separate appeal filed by the NFL Parties on October 29, 2018 regarding the Special Master’s use of the AAP on claim appeals (the “Use of AAP Appeal”), we understand that, given the ongoing concerns about the diagnostic work of numerous MAF Physicians, the Special Masters and Claims Administrator are discussing ways that the Claims Administrator, with the assistance of the AAPs and AAPCs, might provide more quality control and oversight of the diagnostic work of the MAF Physicians and better educate them on the Settlement Agreement’s Injury Definitions.

The NFL Parties appealed each of these claim determinations on the ground that the neuropsychological test scores received on the BAP testing battery were patently insufficient for the Qualifying Diagnosis under the Settlement Agreement (among other grounds for appeal, which differed by claimant). The Special Master denied each appeal (without consultation with the AAP/AAPC), finding in each case that that the NFL Parties had failed to show, by clear and convincing evidence, that the Qualifying Diagnosis was not “generally consistent” with the diagnostic criteria for Level 1.5 or 2 Neurocognitive Impairment (as applicable) under the Settlement Agreement. The Special Master characterized each of these appeal decisions as a “factual determination” and therefore “final and binding.”

The NFL Parties filed timely objections to these appeal determinations. In those objections (initially intended for this Court), the NFL Parties argued that the Special Master’s interpretation of “generally consistent”—whereby retired players who saw the *same* neurologist, took the *same* BAP testing battery and obtained the *same* scores, could nonetheless achieve diametrically opposite results, with BAP participants receiving no compensation while retired players who paid to see the doctor in his MAF capacity received compensation—violated principles of fundamental fairness, created perverse incentives, and impermissibly diluted the bargained-for criteria for Qualifying Diagnoses. The NFL Parties argued that the Special Master’s appeal decisions reflected legal determinations construing the “generally consistent” standard and thus were subject to review by this Court. The NFL Parties also argued that this Court unquestionably had the right to hear these objections and determine the meaning of “generally consistent” because the Court had expressly retained “continuing and exclusive jurisdiction to

interpret, implement, administer and enforce the Settlement Agreement” in accordance with its terms. (Am. Final Order and J. § 17, ECF No. 6534; *see also* Settlement Agreement § 20.1(n).)

The Special Masters (in consultation with the Court) determined that the NFL Parties’ objections would first be ruled on by the Special Master, who would render a written opinion addressing the “generally consistent” question. Claimants and Co-Lead Class Counsel filed responsive briefs with respect to these objections and the Special Master issued the Special Master Generally Consistent Ruling on October 18, 2018.

B. The Special Master Generally Consistent Ruling

The Special Master Generally Consistent Ruling is based solely on interpretation of applicable procedure while avoiding entirely any discussion of the substance of these claim appeals and the egregiously unfair results they produced. The Ruling holds that “the NFL Parties may not object” to the Special Master’s appeal decisions on the “generally consistent” question because those determinations purportedly “were not predicated on conclusions of law.” (Ruling at 1.) In so ruling, the Special Master emphasizes that the Rules Governing Appeals of Claim Determinations instruct the Special Master to “identify in each decision any issue the Special Master determines to be a conclusion of law to which a party to the appeal may object and have it reviewed by the court” (*id.* at 2 (quoting Rule 31)), and noted that his decisions on these appeals “did not identify a conclusion of law” (*id.*). The Special Master contended that the appeals “involved conclusions of fact” because the appeals required him to apply a legal standard—the “generally consistent” standard—to “the undisputed factual circumstances of each case.” (*Id.*) While the Special Master acknowledged that he “must defer to the

Court’s interpretation of the ‘generally consistent’ standard,” he based his decision on the purported “definition of ‘generally consistent’ in FAQ 95” posted on the Settlement Website at the Special Masters’ direction and found that his rulings on the appeals at issue “did not involve conclusions of law, but evaluations of fact against a legal standard that was clearly defined by the parties.” (*Id.* at 2–3.)

The Special Master Generally Consistent Ruling does not discuss, or address in any way, the NFL Parties’ concerns with fundamental fairness, perverse incentives and the widespread dilution of the bargained-for criteria for Qualifying Diagnoses, if the Special Master’s interpretation of “generally consistent” is accepted.

ARGUMENT

I. This Court Incontestably Has the Power to Interpret the “Generally Consistent” Standard and Provide Needed Guidance with Respect to Its Application

The Special Master Generally Consistent Ruling not only sidesteps all of the substantive issues raised in the NFL Parties’ objections to the Special Master’s erroneous interpretation of the “generally consistent” standard, it also purports to insulate the Special Master’s interpretation from *any* review by this Court. Indeed, the ruling attempts to create a remarkable Catch-22: while acknowledging that the Special Master must defer to this Court’s interpretation of the “generally consistent” standard, the Special Master holds that his interpretation and application of the standard to any particular set of facts constitutes a factual determination unreviewable by this Court.

In fact, there is no Catch-22 and this Court can rule on the appropriate interpretation and application of the “generally consistent” standard both because the question is, in truth, one of law, and because this Court retains plenary and exclusive

jurisdiction with respect to the interpretation and implementation of the Settlement Agreement.

A. The Special Master’s Characterization of His Conclusions as Factual Findings Does Not Determine Their True Character

When a Court’s review of a Special Master’s determinations differs depending on whether they involve findings of fact or law, the label a Special Master applies is not determinative. A party is entitled to challenge the Special Master’s characterization of the findings, and the Court must determine their true character. *See Minnesota Mining and Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc.*, No. 4-86-359, 1991 WL 340579, at *1–2 (D. Minn. July 26, 1991) (“It is not the label [the special master] may have used which is conclusive as to which standard of review to apply, but the character of the finding”); *see also Mentor Ins. Co. (U.K.) v. Brannkasse*, 996 F.2d 506, 513 (2d Cir. 1993) (although special master’s findings were “framed as ‘Conclusions of Law,’ such determinations are findings of fact which may not be set aside unless clearly erroneous”); *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 959 (6th Cir. 1976) (“[T]he fact that a trial court labels determinations as ‘findings’ does not make them so if they are in reality conclusions of law.”); *Tri-Tron Int’l v. Velto*, 525 F.2d 432, 435 (9th Cir. 1975) (“We look at a finding or conclusion in its true light, regardless of the label that the district court may have placed on it.”); 9 Moore’s Federal Practice - Civil § 52.32[6] (2018) (“If a court concludes that the trial court mislabeled a conclusion of law as a finding of fact, it may disregard the label and review the issue de novo.”). Accordingly, it is for this Court—not the Special Master—to review the NFL Parties’ objection to these appeal decisions and determine whether they present legal or factual issues.

While the Special Master notes that the Rules Governing Appeals of Claim Determinations provide that the Special Master “will identify in each decision any issue the Special Master determines to be a conclusion of law to which a party to the appeal may object” (Ruling at 2 (citing Rule 31)), any suggestion that this provision reflects the NFL Parties’ agreement to accept the Special Master’s characterization as final and binding is unsupportable. Nowhere in the Rules do the Parties agree to be bound by such characterization or to abandon any right to review by this Court where a Party believes the Special Master has mischaracterized an appealable legal conclusion as a factual finding. The Parties’ agreement that the Special Master would state his view concerning which of his findings constituted conclusions of law (and were thus appealable) was simply a matter of convenience to the Parties and consistent with the typical practice in reports and decisions issued by a Special Master. As the authorities cited above show, Special Masters do not have the final say in characterizing the nature of their findings and thereby securing more deferential review or—as here—insulating their decisions from any review at all.

B. The Interpretation of the Settlement Agreement’s “Generally Consistent” Standard Is a Question of Law

The Settlement Agreement is a contract subject to general principles of contract interpretation. *See, e.g., Greco v. Dep’t of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988) (“It is axiomatic that a settlement agreement is a contract.”). Under those principles, the interpretation of an unambiguous term in a settlement agreement is a conclusion of law. *See In re Johns-Manville Corp.*, 759 F.3d 206, 214 (2d Cir. 2014) (“The interpretation of unambiguous settlement-agreement terms is a question of law subject to *de novo* review.”). Indeed, the Special Master agrees that he “must defer to the Court’s

interpretation of the ‘generally consistent’ standard” (Ruling at 3), thus acknowledging that the interpretation of the standard is a legal issue for the Court to decide.

The Special Master nonetheless attempts to insulate his “generally consistent” determinations from review by this Court, claiming they are wholly factual “because the appeals required the Special Master to apply the undisputed factual circumstances of each case to a legal standard – ‘generally consistent’ – that was clearly established by the parties to the Settlement Agreement.” (*Id.* at 2.) But the Special Master’s logic conflicts with established Third Circuit law. As a general matter, the Third Circuit adopts a mixed standard of review in such circumstances, bifurcating the issue into “distinct factual and legal elements,” and accepting findings of “historical or narrative facts unless they are clearly erroneous,” while exercising plenary review of legal standards and the “application of those precepts to the historical facts.” *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir. 1981). As the authority cited by the Special Master makes clear, “clarifying the meaning of a legal standard involves a question of law.” (Ruling at 2, n.1 (citing Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 133 (2005)). Indeed, this authority goes on to explain—in material omitted by the Special Master—that “[w]hen there are undisputed historical facts and the question is whether a statute applies on those facts, the question may well involve interpreting a term in the statute or deciding as a matter of law whether the statute applies to certain recurring circumstances.” (*Id.* at 113.) That is precisely what the NFL Parties seek here: the NFL Parties ask the Court to “clarify[] the meaning of a legal standard” and, specifically, for the Court to determine, “as a matter of law,” how the “generally consistent” standard applies to “certain recurring circumstances”—namely,

where a retired player is administered the exact BAP testing battery and incontestably would not be entitled to a Qualifying Diagnosis if seen in the BAP, but receives a purported Qualifying Diagnosis by a MAF Physician (for a fee) pursuant to relaxed criteria that manifestly conflict with the judicially approved impairment criteria for that testing battery. The Special Master's determination that the "generally consistent" standard permits such inequitable results is a conclusion of law plainly reviewable by this Court.

C. The Court Has Unquestionable Authority To Interpret the Settlement Agreement's "Generally Consistent" Standard

Even if the Special Master's appeal decisions were purely factual determinations (and they are not), this Court still would have unquestionable authority to consider and determine the proper interpretation and application of the "generally consistent" standard for Level 1.5 and 2 Neurocognitive Impairment claims. This Court expressly retained "continuing and exclusive jurisdiction to interpret, implement, administer and enforce the Settlement" in accordance with its terms. (Am. Final Order and J. § 17, ECF No. 6534; *see also* Settlement Agreement § 20.1(n).) Clarification of the "generally consistent" standard in the recurring circumstances at issue here is essential to the proper functioning and integrity of the Settlement Program.

D. The Special Master's Reliance on FAQ 95 Is Misplaced

The Special Master Generally Consistent Ruling improperly treats FAQ 95 as a binding "definition" of "generally consistent," and, in any event, completely misinterprets the implications of FAQ 95 for the circumstances at issue here. (*See* Ruling at 3.) As an initial matter, the NFL Parties do not agree that FAQ 95 is final or binding authority with respect to the meaning of the "generally consistent" standard in the

Settlement Agreement. Indeed, the NFL Parties explicitly objected to the characterization of the FAQs as “rules of the road.”⁶ Instead, FAQs are helpful guideposts that can neither change the terms of the Settlement Agreement nor serve as final authority on the meaning of its terms. Ultimately, the interpretation of the “generally consistent” standard in the Settlement Agreement is for the Court to decide, as the Special Master concedes. (*See* Ruling at 2.)

In addition, the Special Master Generally Consistent Ruling misinterprets FAQ 95, which, when read in full, strongly suggests that the circumstances at issue here cannot possibly satisfy the “generally consistent” standard. The Special Master focuses only on the first paragraph of FAQ 95, which states that:

Something is “generally consistent with” something else if the two things have more elements or characteristics in common with each other than they have elements or characteristics that differ from each other. The common elements or characteristics must predominate over the uncommon ones.⁷

Based on his reading of this portion of FAQ 95, the Special Master concludes that, to be “generally consistent” with the Injury Definitions for Level 1.5 or 2 Neurocognitive Impairment, a diagnosis outside the BAP must simply be supported by evidence that has “more elements or characteristics in common” with the diagnostic criteria established in the Settlement Agreement than “elements or characteristics that differ.” But this simplistic test cannot be squared with a sensible, contextual definition of “predominate”

⁶ See Feb. 3, 2018 Email from Counsel for the NFL Parties to BrownGreer, Ex. 1 (“[T]he NFL Parties object to the language stating that the FAQs are the ‘rules of the road’ for the Settlement Program. We think this issue can be remedied either by simply deleting the sentence containing this language, or, alternatively, adding to the sentence the phrase ‘subject to the terms of the Settlement Agreement’”).

⁷ See *FAQ 95: What does ‘generally consistent’ mean?*, Settlement Website FAQs, <https://www.nflconcussionsettlement.com/Un-Secure/FAQDetails.aspx?q=246#246>; see also Ruling at 2.

in the above quoted section; nor can it be squared with the portion of the FAQ that actually addresses neuropsychological testing, which the Special Master improperly ignores.

First, to support his interpretation, the Special Master adopts a narrow definition of “predominate” that effectively renders the second sentence of the above-quoted portion of the FAQ entirely redundant of the first. Specifically, the Special Master interprets “predominate”—based on a Merriam-Webster dictionary definition—as meaning “to hold advantage in numbers or quantity” (Ruling at 2 n.2), but notably fails to consider Merriam-Webster’s second definition: “to exert controlling power or influence”⁸ This second definition, which looks to qualitative influence rather than numerical superiority, would give the second sentence of FAQ 95 distinct meaning. Clearly this second definition also makes good sense in this context: to be “generally consistent” is not solely a mathematical exercise of counting commonalities and differences as the Special Master’s analysis suggests. The importance of each commonality and difference is critical as well.

Second, the Special Master entirely ignores the portion of FAQ 95 that actually addresses the question of neuropsychological testing. That portion of the FAQ provides, in relevant part, that a claim “is most solid” when the “Claim Package contains . . . proof of neuropsychological testing that serve[s] the majority of purposes of those specified in [the Injury Definitions] for the diagnosis and that *do not conflict in any manner with*

⁸ *Predominate*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/predominate> (last visited Nov. 7, 2018); *see also Predominate*, American Heritage Dictionary, <https://www.ahdictionary.com/word/search.html?q=predominate> (last visited Nov. 7, 2018) (“predominate” means “to have or gain *controlling power or influence*” or “to be of or have greater quantity *or importance*” (emphasis added)).

those criteria and requirements.”⁹ While the section of FAQ 95 that the Special Master relies on refers to commonalities and differences, it does not address the possibility of conflicts, as this section does. *Conflict* is obviously distinct from a mere *difference*. Neuropsychological testing administered by MAF Physicians could very well have “elements” that “differ” from the BAP testing battery outlined in the Injury Definitions without “conflict[ing] in any manner with the [BAP] criteria and requirements.” The question raised on these appeals is not about differences in the testing battery or whether the different testing nonetheless “serve[s] the majority of purposes of those specified” in the Injury Definitions—because the testing battery in these cases was *identical*. Rather, the question raised on these appeals concerns the direct and irreconcilable *conflicts* between the BAP diagnostic criteria and the watered-down diagnostic criteria that the MAF Physician applied (for a fee) to this identical testing regime, resulting in the retired player receiving a Qualifying Diagnosis that he incontestably could not have received in the BAP. We submit that the guideposts provided in FAQ 95 make clear that such an outcome—demonstrating clear and fundamental *conflicts* with the BAP criteria and requirements—cannot possibly be “generally consistent.”¹⁰

⁹ See FAQ 95: *What does ‘generally consistent’ mean?*, Settlement Website FAQs, <https://www.nflconcussionsettlement.com/Un-Secure/FAQDetails.aspx?q=246#246> (emphasis added).

¹⁰ As stated in the Use of AAP Appeal, where a MAF Physician does not apply the BAP neuropsychological tests but asserts that different, substituted testing and accompanying diagnostic criteria are “generally consistent,” the NFL Parties respectfully submit the Special Master lacks the expertise to evaluate that highly qualitative assertion without expert neutral AAP and AAPC assistance. (See NFL AAP Appeal at 19–20.)

Where, as here, the testing is identical to the BAP battery, the NFL Parties submit that conflicting diagnostic criteria to those established in the Settlement for this precise testing battery cannot be “generally consistent.” But, if the Court were to disagree and rule that conflicting diagnostic criteria (with respect to identical tests) are permitted to some extent and in certain circumstances under the “generally consistent” standard, the NFL Parties respectfully submit that the Special Master concededly lacks the medical expertise to evaluate the qualitative question of their degree of conflict without expert AAPC assistance. As such, to the extent that the Court does not rule that the Special

In all events, the meaning of “generally consistent” as applied to this recurring circumstance is for the Court to determine.

II. The Special Master’s Interpretation of the “Generally Consistent” Standard Is Wrong Because It Treats Identically-Situated Claimants Differently

The Special Master incorrectly interpreted the Settlement Agreement’s “generally consistent” standard to permit precisely the type of disparity it was intended to prevent: treating identically situated retired players differently depending on whether they were evaluated inside or outside of the BAP. The seven claimants at issue here took the full BAP neuropsychological test battery and failed to meet the Settlement Agreement’s objective diagnostic criteria for that test battery to qualify for a diagnosis in the BAP. Yet because these players were paying to see a neurologist in his capacity as a MAF Physician, rather than seeing the same physician for free as a BAP Provider, the Special Master concluded that the MAF Physician could provide Qualifying Diagnoses pursuant to relaxed criteria that nonetheless somehow satisfied the “generally consistent” standard.

The “generally consistent” provision cannot reasonably be interpreted to permit that type of patent inconsistency and, in fact, was specifically intended to avoid it by ensuring that all retired players are placed on equal footing whether evaluated inside or outside of the BAP, and before or after the Effective Date. For that reason, the “generally consistent” standard does not, and cannot, mean that when the administered testing regime is the same as that set forth in the BAP, a MAF Physician can unilaterally change the corresponding, bargained-for and judicially approved impairment and diagnostic criteria for that testing battery in order to give a Qualifying Diagnosis that the player

Master’s interpretation of the “generally consistent” standard is in error, the NFL Parties conditionally request that the Court order the Special Master’s re-review of the seven claim appeals identified herein in consultation with the AAP and AAPC.

incontestably could not have received had he taken the exact same testing in the BAP. The Special Master's interpretation of "generally consistent" in this context subverts its intended purpose and prejudices retired players who participate in the free BAP by subjecting them to a more restrictive diagnostic standard on the same set of tests than retired players who pay for their own examinations. Not only is that position contrary to fundamental fairness, but it also harms the integrity of the Settlement Program and denies the NFL Parties the benefit of their bargain on uncapped exposure.

To date, only forty percent of eligible retired players have sought to schedule BAP examinations, while claim submission reports show that retired players—including the claimants at issue here—are paying to see neurologists acting in their MAF Physician roles despite being eligible to receive the same examinations from the same providers for free in the BAP. In fact, over 70% of payable claim determinations for post-Effective Date Qualifying Diagnoses of Level 1.5 and 2 Neurocognitive Impairment came from MAF Physicians as opposed to BAP Providers.

The diagnoses at issue in these appeals clearly illustrate why retired players are paying to get evaluations outside the BAP. For example, a MAF Physician repeatedly diagnosed one claimant (SPID 950000215) with mild cognitive impairment based on neurological examination and MRI imaging (without neuropsychological testing) between March and August 2017—a diagnosis that is not compensable under the Settlement Agreement and even falls short of Level 1 Neurocognitive Impairment (where Supplemental Benefits are available).¹¹ In October 2017, the claimant took the precise

¹¹ See Doc. No. 148032, Ex. A at 1, 2, 3, 7 (documented as having "Mild cognitive impairment" on the basis of March 2, 2017 clinical evaluation); Doc. No. 148032, Ex. C at 1 (documented as having "Mild cognitive impairment" on the basis of MRI performed on March 24, 2017); Doc. No. 148032, Ex. A at

BAP testing battery and, as a result, received an amended diagnosis of Level 1.5 Neurocognitive Impairment from the MAF Physician. To receive a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment in the BAP, a retired player must have T scores below the cutoff in two or more of the five cognitive domains, with at least one of those domains being Executive Function, Learning and Memory, or Complex Attention. (*See* Settlement Agreement Ex. A-1 at 2, § 1(a)(ii).) Here, the claimant had T scores below the cutoff in only one—not two—domains, and that domain was Language. Indeed, the claimant’s T scores in three domains exhibited no impairment whatsoever (with 0 of 13 tests meeting the impairment criteria), while the T score in the other domain only met the BAP criteria for Level 1. (Doc. No. 148032, Ex. B. at 5.) There can be no dispute that this claimant, who took the precise BAP testing battery, would *not* have qualified for a Level 1.5 diagnosis in the BAP. The conclusion that the MAF Physician’s Level 1.5 diagnosis is “generally consistent”—when it manifestly conflicts—with the requirements of the Settlement Agreement reflects clear and convincing error reversible on appeal.

Similarly, another claimant (SPID 100007941) was administered the full BAP testing battery. Because his only corroboration of functional decline was a third-party affidavit from a girlfriend, the Level 1.5 Neurocognitive Impairment Injury Definition for the BAP would require him to have T scores below the cutoff in two domains, with at least one of those domains being either Executive Function or Learning and Memory to receive a Qualifying Diagnosis. (Settlement Agreement Ex. A-1 at 2, § 1(a)(iii).) The claimant’s neuropsychological test results unambiguously failed to meet the Settlement Agreement’s T-score thresholds in those domains. (*See* Doc. 148877 at 4-5 (claimant’s

11–13 (documented as having “Mild cognitive impairment” by diagnosing physician on August 22, 2017 after review of MRI interpretation).

“[I]level of impairment in [the Executive Function and Learning and Memory domains] is classified as *None*” (emphasis added).) Moreover, the claimant’s neuropsychological testing reflected performance validity issues, including a “suboptimal” validity score on the Test of Memory Malinger, and a mental health assessment found “not interpretable due to a pattern of excessive content-inconsistent false reporting.” (*Id.* at 3, 5.) Nevertheless, Dr. Randolph Evans, acting as a paid MAF Physician rather a free BAP Provider (he was later terminated from the Settlement Program), diagnosed this claimant with Level 1.5 Neurocognitive Impairment. The conclusion that this diagnosis is “generally consistent”—when it manifestly conflicts—with the requirements of the Settlement Agreement reflects clear and convincing error reversible on appeal.

As this Court recognized in the approval process, the Settlement’s design allows retired players to be examined periodically over its term so they may receive diagnoses if their cognitive health declines to a level compensable under the Settlement. The above examples reflect retired players whose condition, over time, might decline to a level compensable under the Settlement Agreement. But there can be no dispute that they do not satisfy those Injury Definitions today.

CONCLUSION

For the reasons set forth herein, the NFL Parties respectfully request that the Court reverse the Special Master Generally Consistent Ruling, deny the Monetary Claim Awards at issue, and clarify that the Settlement Agreement’s “generally consistent” language does not permit a Qualifying Diagnosis of Level 1.5 or 2 Neurocognitive Impairment based on scores on the BAP testing battery that incontestably conflict with the diagnostic criteria set forth in the Settlement Agreement.

REQUEST FOR ORAL ARGUMENT

The NFL Parties respectfully request oral argument on their appeal of the Special Master Generally Consistent Ruling.

Dated: November 7, 2018

Respectfully submitted,
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP

/s/ Brad S. Karp

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*ATTORNEYS FOR THE
NATIONAL FOOTBALL LEAGUE
AND NFL PROPERTIES LLC*

EXHIBIT 1

From: Burns, Douglas
Sent: Saturday, February 3, 2018 3:19 PM
To: 'Erin Maruskin'
Cc: Orran Brown; Morgan Meador; jaw@garretsongroup.com; jbruemmer@garretsongroup.com; jpaschal@garretsongroup.com; mlg@garretsongroup.com; mfrancis@garretsongroup.com; Sydney Gustafson; Emily Engle; Anastasia Danias; Annie Pell; Birenboim, Bruce; cseeger@seegerweiss.com; dbuchanan@seegerweiss.com; Bayard, Lynn B; mrosenberg@seegerweiss.com; Istel, Sarah; sgeorge@seegerweiss.com; Tarlowe, Richard
Subject: RE: Announcing the FAQs
Attachments: Alert on FAQs.docx

Erin,

For the reason stated in Bruce Birenboim's email yesterday to Orran, the NFL Parties object to the language stating that the FAQs are the "rules of the road" for the Settlement Program. We think this issue can be remedied either by simply deleting the sentence containing this language, or, alternatively, adding to the sentence the phrase "subject to the terms of the Settlement Agreement"

The NFL Parties otherwise approve of the draft Alert content.

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From: Erin Maruskin [mailto:emaruskin@browngreer.com]
Sent: Friday, February 02, 2018 2:21 PM
To: Anastasia Danias <Anastasia.Danias@nfl.com>; Annie Pell <annie.pell@nfl.com>; Birenboim, Bruce <bbirenboim@paulweiss.com>; cseeger@seegerweiss.com; dbuchanan@seegerweiss.com; Burns, Douglas <dburns@paulweiss.com>; Bayard, Lynn B <lbayard@paulweiss.com>; mrosenberg@seegerweiss.com; Istel, Sarah <sistel@paulweiss.com>; sgeorge@seegerweiss.com; Tarlowe, Richard <rtarlowe@paulweiss.com>
Cc: Orran Brown <OBrown@browngreer.com>; Morgan Meador <mmeador@browngreer.com>; jaw@garretsongroup.com; jbruemmer@garretsongroup.com; jpaschal@garretsongroup.com; mlg@garretsongroup.com; mfrancis@garretsongroup.com; Sydney Gustafson <sgustafson@browngreer.com>; Emily Engle <eengle@browngreer.com>
Subject: Announcing the FAQs

When we post the approved FAQs to the Settlement Website on Monday, we would like to announce them with the attached draft Alert, which the Special Masters have already reviewed and approved. We seek your permission to post this on the Alerts page of the website after the FAQs are up and add a banner at the top of the Home page with this language from the Alert to draw more attention to it and the new FAQs:

The Claims Administrator posted a full new set of Frequently Asked Questions (FAQs) to the Settlement Website. These new FAQs reflect an ongoing commitment to transparency in the claims

administration process and are the “rules of the road” in the Settlement Program. Click [here](#) to read them.

Please let us know if you have any edits to the Alert or banner text and whether we can proceed as planned.

Thank you,
Erin

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